

E-FILED on 5/3/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL ARIKAT AND PASIMA
ARIKAT,

Plaintiffs,

v.

JP MORGAN CHASE & CO.; LOWE'S HIW,
INC.; MACY'S DEPARTMENT STORES,
INC.; MBNA MARKETING SYSTEMS, INC.;
MIDCOAST CREDIT CORP.; DISCOVER
FINANCIAL SERVICES, INC.; HOME
DEPOT U.S.A., INC.; SEARS, ROEBUCK
AND CO.; WELLS FARGO FINANCIAL
CALIFORNIA, INC.; FAIR ISAAC
CORPORATION; TRANS UNION LLC;
EQUIFAX INC.; EXPERIAN SERVICES
CORP.

Defendants.

No. C-06-00330 RMW

ORDER GRANTING DISCOVER
FINANCIAL SERVICES, INC.'S, FAIR
ISAAC CORPORATION'S, AND MACY'S
DEPARTMENT STORES, INC.'S AND
LOWE'S HIW, INC.'S MOTIONS TO
DISMISS

[Re Docket Nos. 55, 59, 63]

Defendant Discover Financial Services, Inc. ("Discover"), defendant Fair Isaac Corporation
("Fair Isaac") and defendants Macy's Department Stores, Inc. ("Macy's") and Lowe's HIW, Inc.

ORDER GRANTING DISCOVER FINANCIAL SERVICES, INC.'S, FAIR ISAAC CORPORATION'S, AND MACY'S DEPARTMENT
STORES, INC.'S AND LOWE'S HIW, INC.'S MOTIONS TO DISMISS
C-06-00330 RMW
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1 ("Lowe's") separately filed motions to dismiss for failure to state a claim.¹ Defendants Discover and
 2 Fair Isaac also move in the alternative for a more definite statement. Plaintiffs Michael and Pasima
 3 Arikat (collectively "plaintiffs") oppose Discover's motion. On April 17, 2006 plaintiffs filed
 4 oppositions ten days late opposing Fair Isaac's and Macy's and Lowe's motions. On April 28, 2006
 5 the court heard oral argument on these motions. The court has reviewed the parties' papers and
 6 considered their arguments. For the reasons set forth below, the court GRANTS Discover's, Fair
 7 Isaac's, and Macy's and Lowe's motions to dismiss.

8 I. BACKGROUND

9 A. The parties

10 Plaintiffs state that they are credit worthy individuals with a six figure income. Compl. ¶ 8.
 11 Plaintiffs have been issued low credit ratings and have received credit reports with indications of
 12 "default" or "delinquent." *Id.* Plaintiffs have challenged and disputed certain charges on their credit
 13 accounts, which have been ignored by defendants. *Id.* Meanwhile, plaintiffs continue to be charged
 14 interest and late fees by defendants.² *Id.* at 11.

15 Defendant Fair Isaac provides statistically based credit-risk evaluation systems which use
 16 mathematical formulas and are commonly known as credit scoring systems. Fair Isaac Mot. at 3-4.
 17 Third parties, such as credit bureaus, use Fair Isaac's systems to analyze the data in a person's credit
 18 bureau report, producing a credit score commonly known as a "FICO score." *Id.* A FICO score
 19 identifies a person's level of future credit risk, with a low FICO score indicating a high level of
 20 credit risk. *Id.* at 3-5.

21 Defendants Macy's and Lowe's are retailers. Customers of Macy's and Lowe's may have
 22 "Macy's-branded" or "Lowe's-branded" credit cards. These store branded credit card programs are
 23

24 ¹ It appears from Discover's Notice of Motion to Dismiss that Discover only seeks to
 25 dismiss plaintiffs' third, fourth, fifth, and sixth causes of action. *See* Discover's Notice of Mot.
 26 Dismiss; *see also* Discover's Mot. Dismiss at 1-9 (setting forth legal arguments to dismiss the third
 through sixth causes of action). *But see* Discover's Mot. Dismiss at 10 (stating in its conclusion that
 the court should dismiss all seven of plaintiffs' causes of action).

27 ² Plaintiffs' complaint does not specify which defendants were contacted about
 28 plaintiffs' disputes and which defendants are charging interest and late fees.

administered by third party banks and the credit cards are issued pursuant to credit card agreements between the card holder and a third party bank. Macy's and Lowe's Mot. Dismiss at 2-3. It is not disputed that plaintiffs were issued Macy's and Lowe's-branded credit cards. *Id.* at 2. Plaintiffs' Lowe's credit card was issued pursuant to a credit card agreement between plaintiffs and Monogram Credit Card Bank of Georgia and plaintiffs' Macy's credit card was issued pursuant to a credit card agreement between plaintiffs and FDS Bank or GE Capital Consumer Card Co. *Id.* at 2-3.

Defendant Discover apparently provides financial services such as credit cards, certificates of deposit and money market accounts, auto insurance and home loans directly to consumers.³

Plaintiffs' complaint names thirteen defendants: Fair Isaac; JP Morgan Chase & Co.; MBNA Marketing Systems, Inc.; Midcoast Credit Corp.; Discover; Wells Fargo Financial California, Inc.; Trans Union LLC; Equifax, Inc.; Experian Services Corp.; Lowe's; Macy's; Sears, Roebuck and Co.; and Home Depot U.S.A., Inc. Plaintiffs allege that all defendants engaged in credit libel, breach of contract, fraud, violation of the Federal Fair Credit Reporting Act ("FCRA") under 15 U.S.C. § 1681 *et seq.*, violation of the Federal Equal Credit Opportunity Act ("ECOA") under 15 U.S.C. § 1691 *et seq.*, violation of California's Rosenthal Fair Debt Collection Practices Act ("CFDCPA") under Cal. Civ. Code § 1788 *et seq.*,⁴ and intentional infliction of emotional distress. Plaintiffs also contend that defendants were agents and employees of each other acting within the scope and course of such agency and employment in carrying out the alleged violations. Compl. ¶ 5.

B. Related actions

On March 30, 2005 counsel for plaintiffs filed *Hilton v. Fair Isaac, et al.*, C-05-01285 RS, alleging, *inter alia*, credit libel, breach of contract, fraud, violations of the FCRA, and violations of

³ Discover's Memorandum of Points and Authorities in Support of Discover's Motion to Dismiss does not contain a statement of relevant facts. *See* Civil L.R. 7-4(a)(4).

⁴ It appears that plaintiffs' complaint includes a claim under the CFDCPA and but not the federal counterpart, the Fair Debt Collection Practices Act ("FDCPA").

1 the ECOA (the "*Hilton* Complaint").⁵ That action also names certain of the defendants in the instant
 2 suit, namely Fair Isaac, Trans Union, Equifax, and Experian, and is presently a related action before
 3 this court. This court's August 8, 2005 Order Granting Lee Buffington's, San Mateo County's, and
 4 Fair Isaac Corporation's Motion to Dismiss (the "Aug. 8, 2005 Order") granted Fair Isaac's motion to
 5 dismiss without leave to amend.⁶ Aug. 8, 2005 Order at 11.

6 On August 12, 2005 plaintiffs filed *Arikat v. Chase Visa, et al.*, C-05-03302 JW, setting forth
 7 the same seven causes of action as the instant suit (the "Aug. 12, 2005 Complaint").⁷ That action
 8 named the same thirteen defendants as named in the instant action (except that JP Morgan Chase &
 9 Co. was referred to as Chase Visa and Chase Mastercard). On January 10, 2006 the Honorable
 10 James Ware dismissed without prejudice the Aug. 12, 2005 Complaint for failure to prosecute
 11 because plaintiffs had failed to file certificates of service and no parties appeared for a January 9,
 12 2006 case management conference. *See* Jan. 10, 2006 Order of Dismissal by the Honorable James
 13 Ware.

14 C. Alleged causes of action

15 1. Credit libel

16 Plaintiffs contend that defendants Fair Isaac, Trans Union, Experian, and Equifax used
 17 arbitrary and undisclosed criteria to "brand" plaintiffs as not creditworthy by giving plaintiffs a low
 18 FICO score, and further have "promulgated, published and broadcast" plaintiffs' low FICO score in
 19 credit reports, including multiple reports of the same debt. *Id.* ¶ 8. Numerous third parties have
 20 allegedly read and heard these credit reports. *Id.* Plaintiffs claim they were creditworthy and earn a
 21 six-figure income. *Id.* Therefore, defendants' "arbitrarily and discriminatorily published false and
 22

23 ⁵ As requested by Fair Isaac, the court takes judicial notice of the March 30, 2005 First
 24 Amended Complaint for Monetary Damages, Injunction and Declaratory Relief in *Hilton v. Fair*
Isaac, et al., C-05-01285 RS.

25 ⁶ In particular, leave to amend was denied because the plaintiff there had already
 26 amended his complaint once and the court found any further amendment would be futile. Aug. 8,
 2005 Order at 2 n. 2.

27 ⁷ As requested by Fair Isaac, the court takes judicial notice of the January 9, 2006
 28 Order of Dismissal in *Arikat v. Chase Visa, et al.*, C-05-03302 JW.

defamatory and derogatory 'default' and 'delinquent' credit reports against plaintiffs" in their credit reports. *Id.* Moreover, defendants Fair Isaac, Trans Union, Experian, and Equifax allegedly used arbitrary and undisclosed criteria in giving plaintiffs a low FICO score while far less creditworthy persons were being given high FICO scores. The low FICO score given to plaintiffs have allegedly damaged plaintiffs in getting credit and have further lowered their FICO score. *Id.* Plaintiffs state in their complaint that defendants have ignored plaintiffs' disputes as to the accuracy of certain charges and fee assessments on their credit accounts. *Id.* Plaintiffs claim they have made repeated requests to defendants to correct the "erroneous and disputed credit information" in the reports and to retract the published information to no avail. *Id.* Rather, defendants allegedly called plaintiffs "a worse deadbeat" and continued to "tack on interest and late fees [sic] etc. to plaintiffs without answering the disputes or verifying the charges with documents and proof." *Id.* ¶¶ 8, 10-11.

2. Breach of Contract and Fraud

Plaintiffs allege that around February 1, 2004 defendants made "certain misrepresentations" to induce plaintiffs to enter into "various and sundry credit agreements with all named defendants, and/or their assignors" for credit cards and other commercial credit arrangements. *Id.* ¶¶ 16, 23. Plaintiffs claim these were written agreements that provided "plaintiffs would be billed accurately and would not be charged any additional fees not expressly agreed to" and "defendants promised to bill plaintiffs accurately and fairly." *Id.* ¶¶ 17, 24. In support of their claims plaintiffs contend that continuously since February 1, 2004 defendants breached these agreements by: (1) "arbitrarily, unjustifiably, illegally and discriminatorily increasing the monthly payment for plaintiffs, (2) imposing late fees and other 'administrative' and other fees plaintiffs never agreed to," (3) ignoring plaintiffs' notices that they disputed the amounts due, and (4) refusing to provide plaintiffs written proof of the disputed debts.⁸ *Id.* ¶ 18. Plaintiffs claim that they relied upon defendants' alleged misrepresentations and promises and defendants' conduct constitutes fraud. *Id.* ¶¶ 24-25.

⁸ Plaintiffs allegations suggest that both defendants' purported fraudulent conduct inducing plaintiffs to enter into credit agreements and defendants' breach of said agreements commenced February 1, 2004.

3. Violations of the FCRA and the ECOA

Plaintiffs claim that all defendants have violated the FCRA and the ECOA for the same six reasons:

- 1) failing to accurately report credit information;
- 2) reporting false and defamatory credit information against plaintiffs;
- 3) failing to disclose clear and reasonable criteria for how plaintiffs' FICO scores are calculated;
- 4) failing to report that plaintiffs reported having legitimate legal disputes over the accuracy and collectability of certain debts;
- 5) denying plaintiffs credit, re-financing, equity lines of credit, and loans; and
- 6) charging exorbitant interest rates.

Id. ¶¶ 29, 36.

4. Violation of CFDCPA

Plaintiffs additionally claim that all defendants have violated the CFDCPA continuously from February 1, 2004 to the present with (1) "endless annoying and minatory phone calls," (2) "endless letters and minatory notices," (3) calls at 4:00 a.m. and "ceaseless" calls at night, and (4) calls at night and outside their household. *Id.* ¶ 42. Plaintiffs contend these calls violated the CFDCPA because they were made in an annoying and harassing manner. *Id.*

5. Intentional Infliction of Emotional Distress

In their seventh cause of action plaintiffs claim that defendants' conduct alleged in support of plaintiffs' first through sixth causes of action "were outrageous and constitute intentional infliction of emotional distress, waking plaintiffs up at wee hours of the morning with harassing collection phone calls, etc." *Id.* ¶ 46.

II. ANALYSIS

A. Legal Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Dismissal can be based on the "lack of a cognizable legal theory" or "the absence of sufficient facts

alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). The issue is not whether the non-moving party will ultimately prevail but whether it is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The court's review is limited to the face of the complaint, documents referenced in the complaint, and matters for which the court may take judicial notice. *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). When evaluating a Rule 12(b)(6) motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). A court must not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). However, the court is not required to accept conclusory legal allegations "cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

B. Motions to Dismiss

During oral argument on April 28, 2006, plaintiffs' counsel conceded that the only claim plaintiffs could state against Fair Isaac is credit libel.⁹ Accordingly, plaintiffs' second through seventh causes of action are dismissed with prejudice as to Fair Isaac.

1. Credit libel

It is unclear whether plaintiffs' first cause of action is limited only to credit libel. Plaintiffs' first cause of action is styled "credit libel" but alleges credit libel, slander, and libel per se. Compl. ¶ 9. In any event, the complaint fails to allege a claim for relief under any of these legal theories. Libel is "a false and unprivileged publication . . ." and slander is "a false and unprivileged

⁹ Plaintiffs had also conceded several of their claims against Fair Isaac in their opposition. First, plaintiffs conceded they did not have a contract directly with Fair Isaac and that their breach of contract cause of action does not apply to Fair Isaac. Pls.'s Opp. Fair Isaac's Mot. Dismiss at 8. Second, plaintiffs conceded their claims under the ECOA as to Fair Isaac because Fair Isaac "does not act as a direct creditor with respect to plaintiffs." *Id.* at 11. Third, plaintiffs conceded their claims under the CFDCPA as to Fair Isaac because Fair Isaac "does not act as a direct creditor with respect to plaintiffs." *Id.* at 11.

publication, orally uttered." Cal. Civ. Code §§ 45-46. To state a claim for either libel or slander a plaintiff must establish "the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999); Cal. Civ. Code §§ 45-46. Publication means "communication to a third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made." *Id.* In addition, to state a claim for libel, a plaintiff must plead the alleged libelous words. *Okun v. Super. Ct.*, 29 Cal. 3d 442, 458 (1981) (noting that a libel claim "require[s] exact pleading of words of libel").

As an initial matter, plaintiffs' allegations are insufficient in that they are ascribed to defendants collectively rather than to individual defendants. *See Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (holding that where allegations are made against multiple defendants, "plaintiff must allege the basis of his claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2), which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them"). Plaintiffs allege that (1) Fair Isaac, along with three other defendants, have "promulgated, published and broadcast" plaintiffs' low FICO score in credit reports, including multiple reports of the same debt and (2) "defendants" have defamed plaintiffs with "arbitrarily and discriminatorily published false and defamatory and derogatory 'default' and 'delinquent' credit reports against plaintiffs."¹⁰ Compl. ¶ 8. These allegations do not identify the alleged statements made, who made the alleged libelous or slanderous statements, or the falsity of any statements made.¹¹ While plaintiffs vaguely allege that defendants

¹⁰ Plaintiffs' further allegation that defendants acted "maliciously, fraudulently and oppressively, with the wrongful intention of injuring plaintiff, [sic] from an improper and evil motive amounting to malice" is conclusory and supports no inference of libel or slander. *See* Compl. ¶ 13.

¹¹ While the complaint does name Fair Isaac as having "promulgated, published and broadcast" plaintiffs' low FICO score, it is not disputed that Fair Isaac is a provider of statistically based credit scoring systems and does not create or issue credit reports. *See* Compl. ¶ 8 (alleging that Fair Isaac promulgate standards used by the three major credit bureaus); Fair Isaac's Mot. Dismiss at 3-4; Pls.'s Opp. Fair Isaac's Mot. Dismiss at 2 ("The fact is that [Fair Isaac] is responsible for promulgating the criteria under which the other defendants denied plaintiff credit in a discriminatory manner, and libeled him."). In their opposition to Fair Isaac's Motion to Dismiss,

called plaintiff Michael Arikat "a worse deadbeat," plaintiffs have not alleged facts indicating that defendants made the statement to any third party.¹² Accordingly, plaintiffs' first cause of action for credit libel, slander, and libel per se is dismissed as to Fair Isaac, Macy's, and Lowe's.¹³

2. Breach of contract

Under California law, a plaintiff must establish "the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages" to state a breach of contract claim. *First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001). Plaintiffs' second cause of action for breach of contract is dismissed as plaintiffs fail to allege facts indicating the existence of a contract between plaintiffs and any of the defendants. Plaintiffs' vague allegation that they entered into "various and sundry credit agreements with all named defendants, and/or their assignors" is insufficient to provide any of the defendants with fair notice of plaintiffs' claims against them.

In their opposition, plaintiffs state "[t]he defendant [sic] Lowe's and Macy's did not have a contract directly with the plaintiffs." Pls.'s Opp. Macy's and Lowe's Mot. Dismiss at 8. Thus, plaintiffs do not dispute that plaintiffs' Macy's and Lowe's-branded credit cards were issued pursuant

plaintiffs do not dispute that Fair Isaac does not actually determine credit scores or create or issue credit reports. Pls.'s Opp. Fair Isaac's Mot. Dismiss at 1-2. Rather, plaintiffs contend in opposition that Fair Isaac, by promulgating "bogus" secret and arbitrary criteria for credit scoring, is liable as a conspirator with the other defendants in issuing defamatory low credit scores. *Id.* However, plaintiffs' complaint does not allege a conspiracy on Fair Isaac's part. The court need only look at the allegations in plaintiffs' complaint. *Levine*, 950 F.2d at 1483; *see Gilmour v. Gates*, 382 F.3d 1312, 1313 (11th Cir. 2004) (holding that a non-moving party plaintiff cannot raise a new legal claim for the first time in response to the opposing party's summary judgment motion). Moreover, even if the court were to consider an allegation of conspiracy, plaintiffs allege no facts that would support such a legal theory. Plaintiffs' complaint states that each of the defendants were the agent and employee of each of the remaining defendants but the complaint is devoid of any facts that might give rise to any inference of a relationship whether by agency or by employment. Compl. ¶ 5.

¹² Plaintiffs also generally state that "[t]he credit schemes employed by defendants, above described, amount to a 'system of legalized extortion,' by which any purported creditor can threaten to 'ruin a debtor's credit FICO score' by reporting a debt as delinquent or default, unless the debtor pays the creditor what is demanded." Compl. ¶ 8. It is unclear whether plaintiffs contend that the defendants in this action have "threatened" to ruin plaintiffs' credit rating unless plaintiffs agree to timely pay outstanding debt even if disputed. Regardless, plaintiffs' contentions to that effect are conclusory at best and fail to adequately state a claim.

¹³ As noted earlier, it appears defendant Discover moved only to dismiss plaintiffs' third, fourth, fifth, and sixth causes of action.

1 to plaintiffs' credit card agreements with third parties and not Macy's or Lowe's. However, plaintiffs
 2 maintain they may have a breach of contract claim against Macy's and Lowe's. In support, plaintiffs
 3 argue "[w]e are not sure that the fact that these defendants' names are not on the credit contract
 4 absolves them of contractual liability." Pls.'s Opp. Macy's and Lowe's Mot. Dismiss at 1. Plaintiffs
 5 then argue that Macy's and Lowe's may be alter egos of their credit agencies and that "plaintiff needs
 6 [sic] to do discovery to determine what relationship Lowe's and Macy's has to the entire credit
 7 operation." *Id.* Alternatively, plaintiffs suggest Macy's and Lowe's are liable for having acted in
 8 conspiracy with the other defendants. *Id.* These added legal theories are speculative and plaintiffs
 9 offer no facts to support them. In any event, even if plaintiffs were able to support liability under
 10 another legal theory, the facts could not support a theory of breach of contract against Macy's or
 11 Lowe's. Rather, plaintiffs' concession that there is no contract between plaintiffs and either Macy's
 12 or Lowe's indicates that plaintiffs would not be able to state a claim for breach of contract against
 13 Macy's and Lowe's. As such, leave to amend to state a breach of contract claim against Macy's or
 14 Lowe's would be futile. Accordingly, plaintiffs' second cause of action for breach of contract is
 15 dismissed with prejudice as to defendants Macy's and Lowe's.

16 **3. Fraud**

17 To establish a claim of fraud a plaintiff must show (1) a misrepresentation (false
 18 representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to
 19 defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson*
 20 *Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004). Further, Rule 9(b) of the Federal
 21 Rules of Civil Procedure provides "[i]n all averments of fraud or mistake, the circumstances
 22 constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "[W]hen
 23 averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to
 24 give defendants notice of the particular misconduct so that they can defend against the charge and
 25 not just deny that they have done anything wrong." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
 26 1106 (9th Cir. 2003) (internal quotations and citations omitted). The allegations "must be
 27 accompanied by 'the who, what, when, where, and how' of the misconduct charged. *Id.* (citing
 28

1 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997)). "The plaintiff must set forth what is false or
2 misleading about a statement, and why it is false." *Id.*

3 Plaintiffs state their fraud claim as follows:

4 On or about February 1, 2004, defendants made certain misrepresentations to
5 plaintiffs in order to induce them to sign loan and credit agreements. They promised
6 to bill plaintiffs accurately and fairly for actual goods and service [sic] purchased,
7 and only on express terms and conditions agreed to *ab initio*.

8 Plaintiffs relied on said statements to their detriment in that they signed up for the
9 credit cards and charged goods and services, borrowed from defendants and would
10 [sic] up being defamed and harassed by collectors.

11 On or about February 1, 2004, defendants reneged on their promises and agreements
12 above stated, by arbitrarily and discriminatorily increasing the monthly amount they
13 required plaintiffs to pay. And they ignored plaintiffs' dispute of charges. These
14 actions constitute fraud.

15 Compl. ¶¶ 23-25. As with their cause of action for credit libel, plaintiffs' allegations improperly
16 ascribe conduct generally to all thirteen defendants. Plaintiffs' allegations in support of their fraud
17 claim are further deficient in failing to allege specific facts regarding how each defendant has
18 committed fraud upon plaintiffs. In addition, plaintiffs' fraud claim appears to be premised solely
19 upon defendants' purportedly fraudulently inducing plaintiffs to sign loan and credit agreements.
20 Yet, plaintiffs do not allege that the representations were false when made or that any defendant
21 acted with scienter. Plaintiffs' fraud cause of action is dismissed.

22 **4. FCRA Claim**

23 Plaintiffs claim that defendants are subject to civil liability pursuant to 15 U.S.C. §§ 1681m-
24 1681o. 15 U.S.C. § 1681m sets forth the requirements of users of consumer reports to, *inter alia*,
25 give notice of adverse action taken based on credit information.¹⁴ 15 U.S.C. § 1681m(a). 15 U.S.C.
26 §§ 1681n and 1681o create civil liability for willful and negligent noncompliance, respectively, by a
27 consumer reporting agency, user, or furnisher of information who fails to comply with the provisions
28 of the FCRA. 15 U.S.C. §§ 1681n-1681o; *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d

26 ¹⁴ Plaintiffs' fourth cause of action alleges violations of 15 U.S.C. § 1681m, which sets
27 forth requirements of *users* of consumer reports, but plaintiffs' allegations suggest defendants are
28 *furnishers* of credit information. The FCRA requirements for furnishers of credit information are set
forth in 15 U.S.C. § 1681s-2.

1 1057, 1060 (9th Cir. 2002); *Hansen v. Morgan*, 582 F.2d 1214, 1219 (9th Cir. 1978).¹⁵ In order to
 2 state a claim under the FCRA, a plaintiff must allege that the defendant is within the class of
 3 defendants subject to FCRA liability. The term "consumer reporting agency" means:

4 any person which, for monetary fees, dues, or on a cooperative nonprofit basis,
 5 regularly engages in whole or in part in the practice of assembling or evaluating
 6 consumer credit information or other information on consumers for the purpose of
 furnishing consumer reports to third parties, and which uses any means or facility of
 interstate commerce for the purpose of preparing or furnishing consumer reports.

7 15 U.S.C. § 1681a(f). A "furnisher" of credit information is one who provides credit information to
 8 consumer reporting agencies. *Nelson*, 238 F.3d at 1059-60. A furnisher is liable under the FCRA
 9 only if it does not respond to a formal notice of consumer dispute from a consumer reporting agency.
 10 15 U.S.C. § 1681s-2; 15 U.S.C. § 1681i(a)(2); *Nelson*, 282 F.3d at 1060 (holding that Congress set
 11 up 15 U.S.C. § 1681s-2(b) as a "filtering mechanism" wherein a disputatious consumer notifies a
 12 consumer reporting agency which in turns notifies the furnisher, and only a nonresponsive furnisher
 13 may be privately sued).

14 Macy's and Lowe's contend that plaintiffs have not alleged that Macy's and Lowe's are
 15 consumer reporting agencies or furnishers or users of credit information. Macy's and Lowe's Mot.
 16 Dismiss at 11-12. Macy's and Lowe's argue that because plaintiffs' Macy's and Lowe's-branded
 17 credit cards were issued pursuant to credit card agreements between plaintiffs and third parties
 18 unrelated to Macy's or Lowe's, plaintiffs cannot assert that Macy's or Lowe's improperly used
 19 plaintiffs' credit information. *Id.* at 12. Macy's and Lowe's also argue that plaintiffs vaguely
 20 attribute their allegations of FCRA violations to all thirteen defendants without any allegation as to
 21 what credit information was inaccurate, who reported inaccurate information, who used the
 22 information, what credit or re-financing was lost, and which lender imposed a "usurious and
 23 exorbitant interest rate." *Id.* at 13. Plaintiffs' opposition does not dispute that Macy's and Lowe's are

24 ¹⁵ 15 U.S.C. §§ 1681n and 1681o were amended in 1996 such that civil liability for
 25 noncompliance with the FCRA applies to "any person" who fails to comply with the requirements of
 26 the FCRA. *Nelson*, 282 F.3d at 1060. As the Ninth Circuit has explained, this amendment expanded
 27 the class of defendants subject to civil liability under the FCRA to include furnishers of credit
 28 information in addition to consumer reporting agencies and users of information because "there are
 involved in any credit transaction only the consumer, the [credit reporting agencies], the user of the
 credit reports and the furnishers of the credit information." *Id.* at 1060.

1 retailers or that their credit cards were not issued to plaintiffs pursuant to credit agreements with
 2 Macy's or Lowe's. Nevertheless, plaintiffs maintain Macy's and Lowe's are furnishers because "each
 3 entity who handles the data is a furnisher under the eyes of the law." Pls.'s Opp. Macy's and Lowe's
 4 Mot. Dismiss at 10.¹⁶ Plaintiffs, however, cite no legal authority for such a definition of furnisher.

5 Discover argues that plaintiffs' allegations fail to support that defendants were "users" of
 6 credit card information within the meaning of 15 U.S.C. § 1681m or to allege any facts showing
 7 Discover ever used credit information in violation of 15 U.S.C. § 1681m. Discover's Mot. Dismiss
 8 at 5.¹⁷ In opposition, plaintiffs contend each entity who handles the data is a *user* of credit
 9 information under the eyes of the law. Pls.'s Opp. Discover's Mot. Dismiss at 6. Plaintiffs cite no
 10 legal authority for this proposition.¹⁸

11 Plaintiffs' fourth cause of action fails to state a claim under the FCRA. While plaintiffs claim
 12 they are entitled to recover damages, including punitive damages, under an unspecified provision of
 13 the FCRA they neither allege that defendants are credit reporting agencies or users or furnishers of
 14 credit information nor make it clear how their complaints give rise to a claim under the FCRA. *See*
 15 *Burdett v. Harrah's Kansas Casino Corp.*, 294 F. Supp. 2d 1215, 1231 (D. Kan. 2003) (directing
 16 plaintiff to show cause why her FCRA claims should not be dismissed for failure to state a claim
 17 where plaintiff neither alleged that the defendant was a credit reporting agency nor made it clear
 18 how her complaints gave rise to a claim under the FCRA). Plaintiffs' allegation that Trans Union,
 19 Equifax, and Experian "are the three major credit bureaus in the country" who use Fair Isaac's credit

21 ¹⁶ Plaintiffs also argue that Macy's and Lowe's are credit reporting agencies. Pls.'s Opp.
 22 Macy's and Lowe's Mot. Dismiss at 10-11.

23 ¹⁷ Discover also argues that because plaintiffs allege that Discover "furnished"
 24 inaccurate credit information about plaintiffs to credit reporting agencies, 15 U.S.C. § 1681s-2(a)
 25 applies, but that section does not give rise to a private cause of action. Discover is correct in that 15
 26 U.S.C. § 1681s-2(a) is limited to enforcement by governmental bodies; however, it is clear that civil
 liability against "furnishers" are within the purview of 15 U.S.C. §§ 1681n-1681o. *See Nelson*, 282
 F.3d 1057, 1060 (holding that 15 U.S.C. § 1681s-2(b) includes a filtering mechanism against
 frivolous consumer disputes but puts "no limit on private enforcement under §§ 1681n & o" and that
 the 1996 amendment to those sections was to include private causes of actions against furnishers).

27 ¹⁸ In fact plaintiffs uses the same definition for *furnishers* of credit information in their
 28 opposition to Fair Isaac's and Macy's and Lowe's motions.

scoring system does not support an inference that Fair Isaac is itself a consumer reporting agency or a user or furnisher of credit information. *See* Compl. ¶ 8. Neither does this allegation give rise to any inference of FCRA liability against Discover, Macy's or Lowe's. Plaintiffs' introductory allegation that all defendants are each agents and employees of the other is conclusory and similarly unavailing. *See* Compl. ¶ 5. Accordingly, plaintiffs' fourth cause of action is dismissed.¹⁹

5. ECOA Claim

The ECOA's stated purpose is to protect credit applicants and debtors from arbitrary denial or termination of credit.

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction - - (1) on the basis of race, color, religion, national origin, sex or marital status, or age . . . (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act].

15 U.S.C. § 1691(a). An applicant is defined in 15 U.S.C. § 1691a(b) as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." A creditor is defined in 15 U.S.C. § 1691a(e) as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."

Plaintiffs' complaint fails to state an ECOA claim. First, plaintiffs' complaint contains no factual allegations that they were discriminated against based on any of the reasons enumerated in 15 U.S.C. § 1691.²⁰ Second, plaintiffs fail to allege that plaintiffs were applicants within the

¹⁹ At oral argument plaintiffs contend that Macy's and Lowe's were involved at least in credit collection activities with respect to plaintiffs' Macy's and Lowe's-branded credit cards, which plaintiffs will allege if granted leave to amend their complaint.

²⁰ In their oppositions to Discover, Fair Isaac, and Macy's and Lowe's motions, plaintiffs for the first time state that they are of Palestinian origin. Regardless, plaintiffs' allegations of discrimination are wholly conclusory and without factual support. As to Discover, plaintiffs merely allege that:

plaintiffs applied for credit and were defrauded by the actions of the defendants in

1 meaning of 15 U.S.C. § 1691a(b) with respect to Discover, Macy's, or Lowe's.²¹ While plaintiffs
 2 contend that defendants collectively denied plaintiffs "credit, re-financing, equity lines of credit and
 3 loans, etc[.], by charging usurious and exorbitant interest rates — all of this done in violation of
 4 [the] ECOA," plaintiffs provide no facts to support this contention. Compl. ¶ 36. Finally, plaintiffs
 5 enumerate several reasons in support of defendants' alleged violation of the ECOA, namely,
 6 defendants (1) failed to accurately report credit information, (2) reported false and defamatory credit
 7 information against plaintiffs, (3) failed to disclose clear and reasonable criteria for how plaintiffs'
 8 FICO scores are calculated, and (4) failed to report that plaintiffs reported having legitimate legal
 9 disputes over the accuracy and collectability of certain debts. *Id.* Even viewed in the light most
 10 favorable to plaintiffs, these contentions do not support an inference that defendants or defendants'
 11 conduct falls within the purview of the ECOA. Accordingly, plaintiffs' fifth cause of action is
 12 dismissed.²²

13 6. CFDCPA Claim

14 Defendants also move to dismiss plaintiffs' sixth cause of action alleging violations under the
 15 CFDCPA. Defendants Macy's and Lowe's argue that plaintiffs have not alleged that defendants are
 16 "debt collectors" within the meaning of the CFDCPA or that defendants' conduct constitutes "debt

17 wrongfully denying credit and credit services based on the proper [sic] motives of
 18 discrimination against plaintiffs because they are Palestinian which is discrimination
 19 against plaintiffs based on national origin, race, ethnicity and religion.

20 Pls.'s Opp. Discover's Mot. Dismiss at 3. As to Fair Isaac, Macy's and Lowe's, plaintiffs merely
 21 allege "[d]efendant's main *malus animus* is that plaintiffs are of Palestinian origin. Therefore, the
 22 treatment of plaintiffs constitute discrimination based on national origin, race, ethnicity and
 23 religion." Pls.'s Opp. Fair Isaac's Mot. Dismiss at 7; Pls.'s Opp. Macy's and Lowe's Mot. Dismiss at
 24 7.

21 ²¹ Plaintiffs also did not allege that Discover, Macy's, or Lowe's are "creditors" for
 22 purposes of 15 U.S.C. § 1691(a). Macy's and Lowe's acknowledge that plaintiffs have Macy's and
 23 Lowe's-branded credit cards, but contend that those cards were issued to plaintiffs pursuant to credit
 24 card agreements with third parties. Macy's and Lowe's Mot. Dismiss at 13.

25 ²² Plaintiffs do not dispute that their Macy's and Lowe's-branded credit cards were
 26 issued pursuant to credit card agreements with third parties—not with Macy's and Lowe's. Pls.'s
 27 Opp. Macy's and Lowe's Mot. Dismiss at 8. However, at oral argument plaintiffs contend that
 28 Macy's and Lowe's were involved at least in credit collection activities with respect to plaintiffs'
 Macy's and Lowe's-branded credit cards, which plaintiffs will allege if granted leave to amend their
 complaint.

collection" within the meaning of the CFDCPA. Macy's and Lowe's Mot. Dismiss at 14. Specifically, Macy's and Lowe's operate as retailers and did not issue plaintiffs their Macy's and Lowe's-branded credit cards and, as defendants' argument goes, could not have made any debt collection calls. *Id.* at 15. Moreover, Macy's and Lowe's contend that plaintiffs' pleadings fail to state who made the alleged calls, the debts sought to be collected in connection with such calls, and when the calls were made. *Id.* at 14. Defendant Discover likewise argues that plaintiffs' pleadings are insufficient to state a claim under the CFDCPA because the alleged conduct is vaguely attributed to all defendants and the allegations are otherwise conclusory. Discover's Mot. Dismiss at 8.

The CFDCPA serves to "to prohibit *debt collectors* from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require *debtors* to act fairly in entering into and honoring such debts." Cal. Civ. Code § 1788.1 (emphasis added). Article II of the CFDCPA sets forth prohibited conduct of debt collectors and Article III governs the conduct of debtors. Cal. Civ. Code §§ 1788.10-1788.18; §§ 1788.20-1788.22. Therefore, for the purposes of the instant action, plaintiffs must, as an initial matter, allege that each defendant is a "debt collector" with respect to plaintiffs. The CFDCPA defines "debt collector" as:

any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law.

Id. § 1788.2(c). "The term 'debt collection' means any act or practice in connection with the collection of consumer debts." *Id.* § 1788.2(b).

Plaintiffs only allegations in support of their CFDCPA claim are that all defendants have violated the CFDCPA continuously from February 1, 2004 to the present with (1) "endless annoying and minatory phone calls," (2) "endless letters and minatory notices," (3) calls at 4:00 a.m. and "ceaseless" calls at night, and (4) calls at night and outside their household. *Id.* ¶ 42. Moreover, plaintiffs contend these calls violated the CFDCPA because they were made repeatedly and in an annoying and harassing manner. *Id.* Plaintiffs' sixth cause of action is dismissed on two grounds. First, plaintiffs make no allegations that any of the defendants are "debt collectors" within the

1 meaning of the CFDCPA. Second, plaintiffs' allegations, even if accepted as true and viewed in the
 2 light most favorable to plaintiffs, are too vague to give rise to any inference that a specific defendant
 3 has violated the CFDCPA. *See Gauvin*, 682 F. Supp. at 1071. Accordingly, plaintiffs' sixth cause of
 4 action is dismissed.²³

5 **7. Intentional Infliction of Emotional Distress**

6 In order to state a cause of action for intentional infliction of emotional distress a plaintiff
 7 must show: (1) outrageous conduct by defendant, (2) defendant's intended to cause or acted with
 8 reckless disregard of the probability of causing emotional distress, (3) plaintiff suffered severe or
 9 extreme emotional distress, and (4) defendant's outrageous conduct was the actual and proximate
 10 cause of plaintiff's emotional distress. *Trerice v. Blue Cross of Cal.*, 209 Cal. App. 3d 878, 883
 11 (1989). Outrageous conduct is conduct so extreme as to exceed all bounds of that usually tolerated
 12 in a civilized society. *Id.* at 883. Whether conduct constitutes "outrageous conduct" is normally an
 13 issue of fact. *Id.* A court may nonetheless make an initial determination of whether defendant's
 14 conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Id.*

15 In support of their seventh cause of action, plaintiffs allege "[t]he above acts of defendants
 16 were outrageous and constitute intentional infliction of emotional distress, waking plaintiffs up at
 17 wee hours of the morning with harassing collection phone calls, etc." Compl. ¶ 46. Elsewhere in
 18 their complaint, plaintiffs contend they have been "damaged emotionally," have "suffered pain," and
 19 have "suffered emotional distress of anxiety and insomnia and depression, and has incurred great
 20 expenses, and other health, employment and career benefits [sic], as well as lost potential income
 21 earning ability." *Id.* at ¶¶ 12, 20, 33, 40, 43. Plaintiffs' seventh cause of action for intentional
 22 infliction of emotional distress is dismissed. Plaintiffs have not alleged outrageous conduct on the
 23

24 ²³ Plaintiffs do not dispute that their Macy's and Lowe's-branded credit cards were
 25 issued pursuant to credit card agreements with third parties—not with Macy's and Lowe's but they
 26 do not address Macy's and Lowe's motion to dismiss plaintiffs' CFDCPA claim in opposition. Pls.'s
 27 Opp. Macy's and Lowe's Mot. Dismiss at 8. This suggests that plaintiffs would not be able to allege
 28 facts supporting a violation of the CFDCPA by Macy's or Lowe's. However, at oral argument
 plaintiffs contend that Macy's and Lowe's were involved at least in credit collection activities,
 including making collection calls to plaintiffs, with respect to plaintiffs' Macy's and Lowe's-branded
 credit cards, which plaintiffs will allege if granted leave to amend their complaint.

1 part of Fair Isaac, Macy's and Lowe's, or Discover. Moreover, even if plaintiffs' conclusory
 2 allegations of conduct on the part of all defendants collectively were attributed to each defendant
 3 individually, plaintiffs fail to allege that they suffered emotional distress of the requisite severity or
 4 that any of defendants' alleged conduct was the actual and proximate cause. *See Schild v. Rubin*,
 5 232 Cal. App. 3d 755, 762-63 (1991) (holding that the alleged emotional distress must be so
 6 "intense, enduring and nontrivial" that it exceeds what a reasonable person in a civilized society
 7 should be expected to endure).

8 C. Leave to Amend

9 "A party may amend the party's pleading once as a matter of course at any time before a
 10 responsive pleading is served Otherwise a party may amend the party's pleading only by leave
 11 of court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). A motion to dismiss is
 12 not a "responsive pleading" within the meaning of Fed. R. Civ. P. 15(a). *Breier v. N. Cal. Bowling*
 13 *Proprietors' Ass'n*, 316 F.2d 787, 789-90 (9th Cir. 1963). Fed. R. Civ. P. 15(a)'s edict that "leave
 14 shall be freely given when justice so requires" is "to be applied with extreme liberality." *Eminence*
 15 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting *Owens v. Kaiser Found.*
 16 *Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citations omitted)). Absent prejudice or a
 17 strong showing of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by
 18 amendment, or futility of amendment, "there exists a presumption under Rule 15(a) in favor of
 19 granting leave to amend." *Eminence Capital*, 316 F.3d at 1052.

20 In the present action, plaintiffs have not yet had the opportunity to amend their complaint.²⁴
 21 However, it is noted that defendants Home Depot U.S.A., Inc., Sears, Roebuck and Co., Wells Fargo
 22 Financial California, Inc., Equifax, Inc., and Experian Services Corp. have all filed answers to

24 ²⁴ Fair Isaac's argument that this "is the third of its kind" of action filed in the past year
 25 by plaintiffs' counsel is noted. The *Hilton* Complaint and the Aug. 12, 2005 Complaint are indeed
 26 currently before this court. However, although the *Hilton* Complaint alleges almost all the same
 27 causes of actions as the instant suit and has also named Fair Isaac as a defendant, that suit was not
 28 filed on behalf of the plaintiffs in the instant action. While the Aug. 12, 2005 Complaint was filed
 by plaintiffs alleging the same causes of actions and named the same defendants as here, that
 complaint was dismissed without prejudice prior to the benefit of any dispositive motions or
 hearings.

plaintiffs' complaint. As such, plaintiffs may amend their complaint only by leave of court or the defendants' written consent. Plaintiffs have requested leave to amend their complaint both in their opposition briefs and at oral argument (except as to the second through seventh causes of action as to Fair Isaac).

D. Fed. R. Civ. P. 12(e) Motion


Rule 12(e) of the Federal Rules of Civil Procedure provides that "[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Because the court has granted defendants' motions to dismiss, defendants' Fed. R. Civ. P. 12(e) motions are rendered moot.

III. ORDER

For the foregoing reasons, the court:

1. GRANTS Discover's motion to dismiss as to the third, fourth, fifth, and sixth causes of action without prejudice;
2. GRANTS Fair Isaac's motion to dismiss as to the first cause of action without prejudice and GRANTS Fair Isaac's motion to dismiss as to the second through seventh causes of action (inclusive) with prejudice;
3. GRANTS Macy's and Lowe's motion to dismiss as to the first, third, fourth, fifth, sixth, and seventh causes of action without prejudice and GRANTS Macy's and Lowe's motion to dismiss as to the second cause of action with prejudice; and
4. GRANTS plaintiffs twenty (20) days to amend their complaint.

DATED: 5/3/06


 RONALD M. WHYTE
 United States District Judge

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17 **Dated:** 5/3/06

SPT
18 **Chambers of Judge Whyte**